

United States District Court

Northern District of California

Before The Honorable William Alsup

Oracle America,)
Incorporated,)

Plaintiff,)

vs.)

No. C10-3651 WHA

Google, Incorporated,)

Defendant.)

San Francisco, California

Thursday, July 21, 2011

Reporter's Transcript Of Proceedings

Appearances:

For Plaintiff: Morrison & Foerster, LLP
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By: Michael A. Jacobs, Esquire

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By: Matthew Sarboraria, Esquire

(Appearances continued on next page.)

Reported By: Sahar Bartlett, RPR, CSR No. 12963
Official Reporter, U.S. District Court
For the Northern District of California

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He overlooks the actual negotiations --

THE COURT: Repeat that last point again about diminimus and -- say that again. Where did that come from?

MR. VAN NEST: Yeah, that came from Oracle's representations to the federal regulators when they acquired Sun. And there was an investigation into whether this was anti-competitive or not, that, hey, we have always licensed Java, we have never refused to license Java, and we have licensed it at diminimus rates.

And now you have Dr. Cockburn coming in here and claiming that in a hypothetical negotiation, Google would have agreed to pay 15 to 20 percent of all of its ad revenue off every handset sold by every carrier, not only using Android, but as I understand his report, every other platform as well.

Now, the actual negotiations, in the actual negotiations, Sun proposed a royalty all in for three years of a hundred million dollars, and that was rejected by Google. That was offered, according to Dr. Cockburn and according to the evidence --

THE COURT: Well, what difference does it make? Why does it matter if Google rejected it? Google may have been playing -- they may have just been trying to get it on the cheap, that doesn't mean it was reasonable to reject it.

MR. VAN NEST: No, Your Honor, Your Honor --

THE COURT: It may mean that the offerer was willing

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to take a hundred million, but the rejection means nothing, does it? What could it possibly mean?

MR. VAN NEST: Well, it doesn't mean nothing, Your Honor, but your point is well taken; it probably means more that that's what Sun offered, that's what Sun was willing to take. In other words, in the hypothetical negotiation --

THE COURT: And then your side -- tell me why there isn't willful infringement here.

MR. VAN NEST: I will.

THE COURT: Because you went to get the license, you didn't follow through, and now you got a production out there that is in direct violation of these patents?

MR. VAN NEST: None of those.

THE COURT: That's a very hard scenario -- I am going to ask you, but I bet you've never seen that scenario before. I have not.

MR. VAN NEST: And you won't see it here, either, Your Honor.

THE COURT: Well, then, why isn't there willful infringement?

MR. VAN NEST: I'll explain why.

THE COURT: All right. Leave enough time.

MR. VAN NEST: The negotiation that took place was not a pure licensing negotiation. And that's been confirmed by all the participants, including Mr. Schwartz, the CEO of Sun at

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the time.

Google had two essential options in building Android: They could have entered into a technology partnership with another company and contributed resources and engineers and built Android together, that's what they were discussing, in fact, with Sun.

They discussed that same thing, Your Honor, with several other companies that already had virtual machines. So they went to several companies, not just Sun, and said, do you want to build this project with us together? We'll provide engineers and technology, you provide engineers and technology, and we'll build the product together and the advantage of that was, it might be a little faster.

The other option they had was to build it on their own, build it independently and using their own engineers, own technology and/or licensing technology from other third parties, not -- not just Sun, because many other folks were building virtual machines.

What happened was, they couldn't come to terms with Sun -- by the way, in those negotiations, there wasn't any specific discussion of the patents. Nobody showed them Sun patents. Nobody said, are you infringing these patents. They didn't see these Sun patents until Oracle showed them to them a month before --

THE COURT: Why did they need their license, then?

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MR. VAN NEST: They were negotiating a technology partnership, they were negotiating an agreement. They weren't coming to say, we need a license to your technology, they were coming to say, we have a product and a project we would like to build, we would like to build it together, you guys have technology that might be useful, we have technology that might be useful, let's partner together and build it.

And that is what was being proposed in 2005 and 2006 in these discussions we've been talking about. That was not acceptable, ultimately, either to Google or to Sun, they couldn't reach term on that. So Google went out, they built their own. They used a clean-room environment. They didn't look at any of these Sun patents we're talking about.

And the kicker is, Your Honor, discussions continued, there were further discussions; Sun became more and more and more interested in getting on the Android bandwagon.

So when Android was announced in 2007, Sun didn't throw up their hands and say, oh, my gosh, you're infringing, Sun congratulated Google on Android, welcomed Android to the Java community, put Android on Sun products, asked Google how they could help Android.

The whole point was that Android was something that Sun saw, then, as beneficial to them, something that would spread the news and the word about Java. They didn't come in in 2007 --

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